Supreme Court, U.S.
FILED
AUG 18 1994
OFFICE OF THE CLERK

No. 94-134

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

SARAH ASHBY SAWTELL,
Petitioner,

VS.

E. I. DU PONT DE NEMOURS AND COMPANY, INC.,
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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August 18, 1994

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

(1) Should this Court take jurisdiction of a case which recognized the validity of the class action tolling doctrine but held it inapplicable to Petitioner because of an interpretation of the pleadings in the class action?

(2) Should this Court take jurisdiction of a case that held the class action tolling doctrine inapplicable to an alleged class member who filed an independent lawsuit against one class action defendant while the class action was pending, but slept on her right to sue the other class action defendant until after the statute of limitations expired?

(3) Should this Court take jurisdiction of a case where the class action complaint failed to give the defendant adequate notice of the substantive claims now made against it?

(4) Should this Court take jurisdiction of a case in which the plaintiff has no viable cause of action even if the class action tolling doctrine is applied because, as numerous courts have held in the same fact pattern, the defendant owed no legal duty to plaintiff?

LIST OF PARTIES

Petitioner is Sarah Ashby Sawtell ("Sawtell"), and Respondent is E.I. du Pont de Nemours & Company, Inc., a Delaware corporation ("DuPont").

RULE 29.1 STATEMENT

There are presently two *publicly* held entities in which respondent DuPont, or a subsidiary or affiliated company of DuPont, owns an interest: Du Pont Canada Inc. is a subsidiary company, and DNA Plant Technology Corporation is a company in which DuPont holds an indirect minority, noncontrolling interest.

The Seagram Company, Ltd., through its wholly owned subsidiary companies, owns approximately 24.2 percent of DuPont common stock.

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DuPont respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Sawtell.

COUNTERSTATEMENT OF THE CASE

In this diversity action, Sawtell, a resident of New Mexico, seeks damages from DuPont based on strict liability and negligence theories. Sawtell alleges that she was injured by two different temporomandibular joint ("TMJ") implants designed, manufactured, and sold by Vitek, Inc., a federally regulated medical device manufacturer. The implants in question were an interpositional implant and a total joint replacement which were implanted at different times. Both implants were made by Vitek from a Vitek-patented biomaterial called Proplast®. One of the raw materials used by Vitek in fabricating Proplast® was a plastic polymer, polytetrafluoroethylene ("PTFE"). PTFE is sold by numerous manufacturers, including DuPont under the trademark Teflon®.

Sawtell's statements at page 2 of her Petition regarding DuPont's supposed knowledge of the danger of the use of its raw materials in Vitek's products are misstatements, unsupported by the record, and irrelevant to the questions presented for review. In fact, DuPont's policy before selling any raw material (not just PTFE) to any medical device manufacturer, including Vitek, was to advise the purchaser that its materials were not made for medical use and that the purchaser would have to use its own scientific and medical judgment in deciding whether the raw material was appropriate. Consequently, Vitek evaluated the safety of its Proplast® implants, tested the components of the devices in animals and humans, and sold the implants to oral surgeons and other licensed physicians after being authorized to do so by the Food and Drug Administration.

Sawtell's interpositional implants were removed in December of 1984, only ten months after they had been implanted, and were replaced with total joint replacements. The total joint replacements were removed in September of 1987. The Court of Appeals found, and Sawtell no longer disputes, that she knew or should have known by September 1987 that her injuries were caused by a foreign body reaction to the "Proplast®/Teflon®" materials in the implants. Consequently, Sawtell's claims against DuPont were barred by New Mexico's three-year statute of limitations unless they were filed before September 1990.

On March 31, 1989, unbeknownst to Sawtell, a class action suit, *Blaschka-Mansfeldt v. Vitek, Inc.*, was filed in Minnesota state court against Vitek and DuPont on behalf of injured recipients of Vitek's interpositional implants. *See* Petition A13-14. Two other identical class actions were filed shortly thereafter, also in Minnesota state court: *Monsaas v. Vitek, Inc.* and *Dietz v. Vitek, Inc.*[1] *See id.* at A15-17, A20. The class actions did not involve persons who, like Sawtell, had received the total joint replacement implant. The class action complaints also specifically stated that the relevant implants were implanted "by a dental health care provider licensed in the State of Minnesota" (Respondent's App. at A-1 - A-2, A-4 - A-5). Motions to certify filed later in the class actions confirmed that the complaints were intended only to include only Minnesota plaintiffs. The Court of Appeals analyzed the pleadings and interpreted them as not making Sawtell a member of the putative class of Minnesota implant recipients.

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[1] *Monsaas* and *Dietz* subsequently were removed to federal district court in Minnesota on the basis of diversity.

Although DuPont was named in the class actions, it was lumped together with the other defendants. Contradictory allegations were made that the defendants "or some of them" had designed, manufactured and sold Proplast® TMJ Implants. No specific allegations were directed against DuPont in the complaints and no claim was made that DuPont was liable as a raw material supplier to Vitek, the basis of DuPont's alleged liability here. Sawtell makes no claim that she knew of or relied on the Minnesota class action complaints in deciding whether or when to sue DuPont herself.

On April 14, 1989, during the pendency of the class action litigation, Sawtell filed her own product liability suit against Vitek for her alleged injuries from the interpositional and total joint replacement implants ("the *Vitek* case"). Unlike the plaintiffs in the Minnesota class actions, Sawtell chose not to sue DuPont at that time. During the course of her litigation in the *Vitek* case, Sawtell's attorney took the deposition of Vitek's president on February 28, 1990, and obtained specific testimony concerning DuPont's sales of raw materials to Vitek. On June 8, 1990, Vitek filed a suggestion of bankruptcy in the *Vitek* case. Sawtell then delayed until September 20, 1990 before filing the present lawsuit against DuPont.

Despite the fact that during the pendency of the Minnesota class actions, Sawtell knowingly chose to sue only Vitek, she now seeks to take advantage of this Court's class action tolling doctrine to save her untimely individual action against DuPont. The Court of Appeals correctly held that the tolling doctrine should not apply given this factual scenario.

REASONS FOR DENYING THE WRIT

The Petition for Certiorari never focuses on what the Court of Appeals actually decided — a question of pleading interpretation. The court read the Minnesota class action complaints as limited to Minnesota residents; hence, it concluded that Petitioner, a resident of New Mexico, would not have been a member of the proposed classes and could not claim tolling. This ruling was correct but, even more importantly, is a narrow determination that is extremely unlikely to have consequences beyond the immediate case.

The issues that Petitioner would prefer to argue are not presented by this case. The Court of Appeals did not reach the question whether the tolling doctrine applies in diversity cases. Petitioner's criticisms of other lower court decisions, or even of the district court's now-superseded ruling, are beside the point. Finally, review by this Court would be futile because, even if the tolling doctrine somehow salvaged Petitioner's complaint, courts reaching the merits of Proplast® TMJ implant claims against DuPont have consistently held that such claims are invalid as a matter of law.

I. The Court of Appeals' Decision Does Not Conflict With The Class Action Tolling Doctrine.

The Court of Appeals' decision did not limit the scope of the class action tolling doctrine in any way. Citing *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983), the Court of Appeals expressly noted that "[t]he filing of the class action suit tolls the statute of limitations for all asserted class members, and the statute of limitation remains tolled 'until the class certification is denied.'" Petition at A8-A9.

In fact, none of the broad issues identified by Sawtell were addressed by the Court of Appeals. The court did not reach the question of whether the class action tolling doctrine applies in diversity cases,[2] or whether the named plaintiff must have standing. *See* Petition at 13-14. Nor did the court address any other issue as to which reported case law reflects some supposed "confusion" or "hostility." *See id.* The Court of Appeals only interpreted the complaints and other documents filed in the Minnesota lawsuits that Sawtell claimed were relevant. As the record reflects:

- the class actions were initiated within the Minnesota state system pursuant to Minnesota's class action rule;

- the complaints said nothing about attempting to establish a nationwide class;

- the complaints expressly stated that the implants were implanted "by a dental health care provider licensed within the State of Minnesota"; and

- later motions to certify confirmed that the proposed class was limited to Minnesota residents.

Based on the relevant documents, the Court of Appeals rightly held that Sawtell was not one of the "asserted members of the class who would have been parties had the suit been permitted to continue as a class action." Petition at A10, *citing*

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[2] As Sawtell acknowledges, any conflict as to whether the class action tolling doctrine applies in diversity cases is only a conflict in *dicta*. *See* Petition at 13-14.

Crown, 462 U.S. at 353-54, and *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974). Nothing broader was decided. There is no conflict or question of general public importance involved in this case.

II. The Court of Appeals' Decision Is Supported On Other Narrow Grounds.

The Court of Appeals' decision was proper on two other narrow grounds that do not involve any conflict or question of general public importance.

First, tolling has never been applied where, notwithstanding the existence of the class action suit, the plaintiff filed an independent action against one of the class defendants. Tolling has been applied only where the putative class member postponed filing any lawsuit under the legal fiction that he or she was relying on the class action to protect his or her rights. *Crown*, 462 U.S. at 352 ("Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights . . . ."); *American Pipe*, 414 U.S. at 541. *See also Lego v. McNeilab, Inc.*, 1986 W.L. 338 (E.D. Pa., April 11, 1986) (tolling doctrine inapplicable where plaintiff filed action while class suit was pending).

Second, the allegations in the Minnesota complaints did not give DuPont the required notice of the substantive claims being brought against it nor the number and identities of the potential plaintiffs.[3] *Crown*, 462 U.S. at 354 (Powell, J., concurring);

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[3] Contrary to Sawtell's statements at page 11 of her Petition, there was sufficient evidence on this issue: the complaints themselves.

American Pipe, 414 U.S. at 554-555; the class action complaints in Minnesota were brought on behalf of "recipients of surgical implants of Vitek's Proplast® TMJ *Interpositional* Implants." Petition at A15 (emphasis added). The only implant that is subject to any real dispute in this case is the total joint replacement that Sawtell received in September 1987.[4] The Minnesota plaintiffs' "shotgun" approach to pleading also did not give DuPont notice of claims like those asserted by Sawtell. The substantive allegations in the Minnesota complaints were directed only against Vitek and its founder, Dr. Charles Homsy, and make no reference whatsoever to DuPont's raw materials. Under the circumstances, Sawtell's claims are "[c]laims as to which [DuPont] was not fairly placed on notice by the class suit [and] are not protected under *American Pipe* and are barred by the statute of limitations." *Crown*, 462 U.S. at 355 (Powell, J., concurring).

III. Consideration Of The Questions Presented Would Be Futile, Because Petitioner's Action Is Meritless.

Even if tolling applied, Sawtell would have no cause of action, because DuPont had no state-law legal duty to her. In the district court, DuPont moved for summary judgment on both the statute of limitations and the absence of any legal duty. The district court declined to address the duty issue, which had been fully briefed, in light of its ruling on the statute of limitations. Numerous other courts, however, have held that DuPont, as a bulk raw material supplier, owed no duty to the users of a fin-

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[4] Sawtell received interpositional implants too, but they were removed in December 1984, and the three-year statute of limitations for filing any claims relating to them expired long before the Minnesota actions were initiated.

ished medical device that was designed, manufactured, and sold by another company. Thirty-four consecutive trial court rulings and all seven appellate decisions to date have held that DuPont is entitled to judgment as a matter of law.[5]

In light of the numerous decisions on the issue of duty, it would be a waste of time for this Court to decide whether the statute of limitations for Sawtell's cause of action was tolled by the filing of the Minnesota class actions. Certiorari should not be granted to issue what in effect would be an advisory opinion.

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[5] The following decisions have been designated for publication: *Klem v. E.I. du Pont de Nemours & Co.*, 19 F.3d 997 (5th Cir. 1994); *Rynders v. E.I. du Pont de Nemours & Co.*, 21 F.3d 835 (8th Cir. 1994); *Kealoha v. E.I. du Pont de Nemours & Co.*, 844 F. Supp. 590 (D. Haw. 1994); *Kalinowski v. E.I. du Pont de Nemours & Co.*, 851 F. Supp. 149 (E.D. Pa. 1994); *LaMontagne v. E.I. du Pont de Nemours & Co.*, 834 F. Supp. 576 (D. Conn. 1993); *Hegna v. E.I. du Pont de Nemours & Co.*, 825 F. Supp. 880 (D. Minn. 1993) (affirmed by Eighth Circuit, Nos. 93-3162/93-3173, in unpublished *per curiam* order on June 22, 1994); *Nowak v. E.I. du Pont de Nemours & Co.*, 827 F. Supp. 1334 (W.D. Mich. 1993); *Anguiano v. E.I. du Pont de Nemours & Co.*, 808 F. Supp. 719 (D. Ariz. 1992); *Miller v. E.I. du Pont de Nemours & Co.*, 811 F. Supp. 1286 (E.D. Tenn. 1992); *Veil v. Vitek, Inc.*, 803 F. Supp. 229 (D.N.D. 1992); *Collins v. E.I. du Pont de Nemours & Co.*, __ P.2d ___, 2 CA-CV 92-0247 (Ariz. Ct. App., Oct. 26, 1993 — publication ordered Dec. 10, 1993); *Bond v. E.I. du Pont de Nemours & Co.*, 868 P.2d 1114 (Colo. App. 1993); *Longo v. E.I. du Pont de Nemours & Co.*, 632 So. 2d 1193 (La. App. 1994). After denying class certification, the Minnesota trial court granted summary judgment to DuPont on the issue of duty in *Blaschka-Mansfeldt v. Vitek, Inc.*, No. 89-1534 (Minn. Dist. Ct., Jan. 5, 1994). A New Mexico trial court also granted summary judgment to DuPont on the issue of duty in *Parker v. E.I. du Pont de Nemours & Co.*, No. CV-91-423 (N.M. Dist. Ct., Apr. 4, 1994).

CONCLUSION

For all of the above reasons, DuPont respectfully requests that this Court deny the Petition for Certiorari.

RESPECTFULLY SUBMITTED.

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August 18, 1994

APPENDIX

BLASCHKE-MANSFELDT v. VITEK, INC., E.I. DU PONT DE NEMOURS & CO., a Delaware corporation, and CHARLES A. HOMSY and ANN HOMSY

State of Minnesota
County of Hennepin
Fourth Judicial District Court
No. 89-1534

Excerpts from
PLAINTIFF'S FIRST AMENDED COMPLAINT
Filed March 31, 1989

COMES NOW, PLAINTIFF Constance Blaschke-Mansfeldt, by and through her attorneys, Charles S. Zimmerman, Esq. and Ronald S. Goldser, Esq., of Zimmerman Reed, individually and representative of a class of individuals similarly situated, for her Complaint in Class Action states and alleges:

. . .

COUNT I
NEGLIGENCE

5. That Defendants, all of them or some of them and each of them, negligently designed, manufactured, processed, placed in the marketplace, obtained FDA approval, promoted, advertised, supplied, distributed, sold, and/or failed to warn about a temporal mandipular joint prosthesis known as "Proplast."

6. That on or about December 26, 1984 Proplast was implanted in the body of the Plaintiff by a dental health care

provider licensed in the State of Minnesota. That as a direct result of the conduct of the Defendants and each of them as stated in paragraph 5, Plaintiff has sustained serious, painful and permanent injuries together with emotional pain and discomfort, . . .

COUNT II
STRICT LIABILITY

7. Plaintiff re-alleges paragraphs 1 through 6 above.

8. The product Proplast was defective and unreasonably dangerous; the Defendants, and each of them, knew or should have known that Proplast was defective and unreasonably dangerous but nonetheless placed Proplast into the stream of commerce and/or failed to warn of the defectiveness and unreasonable danger; the defects and dangers of Proplast were beyond the contemplation of the reasonable consumer and Plaintiff; the Proplast was implanted in Plaintiff and used by Plaintiff in a reasonably foreseeable manner.

9. The product Proplast caused harm to Plaintiff and Defendants, because of their superior knowledge and position, owed a strict duty to Plaintiff not to harm her through the use of their product.

10. That as a direct result of Defendants activities in designing, manufacturing, processing, placing in the market place, obtaining FDA approval, promoting, advertising, supplying, distributing and/or selling the product Proplast, Plaintiff has suffered the damages as more fully set forth in paragraph 6 above for which the Defendants are strictly liable.

COUNT III
WARRANTY AND MISREPRESENTATION

11. Defendants, and each of them, warrant and represented to Plaintiff, by and through the use of materials accompanying the distribution of the product Proplast that the product was safe for use in the manner in which it was used in Plaintiff.

12. At the time of marketing Defendants and each of them, knew or should have known that their representations and warranties were false, and that the product Proplast was not fit for the particular purpose to which it was to be put.

13. As an approximate result of the breach of warranty and misrepresentation by Defendants, Plaintiff has suffered the damages more fully set forth in paragraph 6 for which the Defendants are strictly liable.

. . .

MONSAAS v. VITEK, INC., E.I. DU PONT DE NEMOURS & CO., and CHARLES A. HOMSY and ANN HOMSY

State of Minnesota
County of Hennepin
Fourth Judicial District Court
No. 89-7382

Excerpts from
COMPLAINT
Filed May 4, 1989

COMES NOW, PLAINTIFF Barbara Monsaas, by and through her attorneys, Charles S. Zimmerman, Esq. and Ronald S. Goldser, Esq., of Zimmerman Reed, individually and representative of a class of individuals similarly situated, for her Complaint in Class Action states and alleges:

. . .

COUNT I
NEGLIGENCE

5. That Defendants, all of them or some of them and each of them, negligently designed, manufactured, processed, placed in the marketplace, obtained FDA approval, promoted, advertised, supplied, distributed, sold, and/or failed to warn about a temporal mandipular joint prosthesis known as "Proplast."

6. That on or about May, 1985, Proplast was implanted in the body of the Plaintiff by a dental health care provider

licensed in the State of Minnesota. That as a direct result of the conduct of the Defendants and each of them as stated in paragraph 5, Plaintiff has sustained serious, painful and permanent injuries together with emotional pain and discomfort, has been required to expend substantial sums of money for her own continued care and treatment, . . .

COUNT II
STRICT LIABILITY

7. Plaintiff re-alleges paragraphs 1 through 6 above.

8. The product Proplast was defective and unreasonably dangerous; the Defendants, and each of them, knew or should have known that Proplast was defective and unreasonably dangerous but nonetheless placed Proplast into the stream of commerce and/or failed to warn of the defectiveness and unreasonable danger; the defects and dangers of Proplast were beyond the contemplation of the reasonable consumer and Plaintiff; the Proplast was implanted in Plaintiff and used by Plaintiff in a reasonably foreseeable manner.

9. The product Proplast caused harm to Plaintiff and Defendants, because of their superior knowledge and position, owed a strict duty to Plaintiff not to harm her through the use of their product.

10. That as a direct result of Defendants activities in designing, manufacturing, processing, placing in the market place, obtaining FDA approval, promoting, advertising, supplying, distributing and/or selling the product Proplast,

Plaintiff has suffered the damages as more fully set forth in paragraph 6 above for which the Defendants are strictly liable.

COUNT III
WARRANTY AND MISREPRESENTATION

11. Defendants, and each of them, warranted and represented to Plaintiff, by and through the use of materials accompanying the distribtion of the product Proplast that the product was safe for use in the manner in which it was used in Plaintiff.

12. Specifically, Defendant Vitek warranted and represented as follows:

. . .

13. The foregoing warranties and representations were made by Defendant Vitek in their brochures accompanying the products sent to doctors. The warranties and representations were used by the Plaintiff's physicians as the basis for their recommendations for medical treatment for Plaintiff. Plaintiff relied on these warranties and representations.

14. The warranties breached are expressed (336.2-313); implied warranty of merchantability (336.2-314); and fitness for particular purpose (336.2-315).

15. At the time of marketing, Defendants and each of them, knew or should have known that their representations and warranties were false, and that the product Proplast was not fit for the particular purpose to which it was to be put.

16. As a proximate result of the breach of warranty and misrepresentation by Defendants, Plaintiff has suffered the damages more fully set forth in paragraph 6 for which the Defendants are strictly liable.

. . .